02-1120 JAN 21 2003
No. _____
OFFICE OF THE CLERK

In The Supreme Court of the United States

MAYU BURR,

Petitioner,

v.

JOHN ASHCROFT,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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January 21, 2003

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43 pp

QUESTIONS PRESENTED

Question No.1: Does 8 USCS § 1154(a)(1)(A)(ii) grant an entitlement to file a self-petition to the alien spouse of a living U.S. Citizen (and perhaps additionally to the widow/widower of a deceased U.S. Citizen), or does 8 USCS § 1154(a)(1)(A)(ii) grant an entitlement exclusively to the former spouse of a dead U.S. citizen?

Question No.2: Is the Attorney General's interpretation of 8 USCS § 1154(a)(1)(A)(ii) (that "spouse" means "widow"), which is contrary to the plain language meaning of that statute, reviewable?

Question No.3: Is the Attorney General's "refusal to accept an ... application"[1] reviewable?

Question No.4: Does the Attorney General have a non-discretionary duty[2] pursuant to 8 USCS § 1154(b) to grant the true petition tendered by the alien spouse of a living U.S. citizen?

Question No.5: May the Attorney General treat a "petition for classification as Immediate Relative of a U.S. Citizen" as equivalent to a "petition for adjustment of status", even though approval of the former is non-discretionary and reviewable,

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[1] Gonzalez Ex Rel. Gonzalez v. Janet Reno, Attorney General, 86 F.Supp.2d at 1177 (S.D.Fla. 2000), affirmed 212 F.3d 1338 (11th Cir. 2000).

[2] Chan v. Bell, DCDC 1978, 464 F. Supp. 125

while approval of the latter is discretionary?

Question No.6: May the Attorney General with impunity intentionally redact the text of an impertinent Statute to his benefit and to the detriment of Appellant Mayu Burr, by making statute 8 U.S.C. § 1255(a) appear to pertain to all aliens, when the un-redacted text shows that the Statute pertains only to unmarried aliens?

Question No.7: Did the Attorney General violate the civil rights and human rights of Appellant Mayu Burr and her U.S. Citizen husband when he refused to consider and process her petition for classification as Immediate Relative, and thereby deprived her from working, from receiving an unrestricted Social Security number, from applying for citizenship, and from traveling in and out of the United States with her husband?

Question No.8: When a Federal Officer violates a person's civil or human rights, is the person required to first exhaust administrative remedies before seeking relief in the Federal courts?

Question No.9: When a Federal Officer or agency sends a final determination to a person, is the person required to first search for and exhaust other administrative remedies before seeking relief in the Federal courts?

Question No.10: Is the potential option of asking a U.S. Citizen to petition on behalf of the alien an "available administrative remedy" for violation of Appellant Mayu Burr's own right to self-petition

for classification as an Immediate Relative of a U.S. Citizen?

Question No.11: To the extent that exhaustion of available administrative remedies may have been required before seeking relief in the courts, did Appellant Mayu Burr adequately demonstrate, on the pleadings, exhaustion of administrative remedies *personally available to her*?

Question No.12: By refusing to officially recognize that Appellant Mayu Burr is the wife of a U.S. Citizen and to issue documentation to that effect, is the Attorney General complying with his duty under the INA to promote "reunification of families and the preservation of family units ... to preserve family life and family relationships which is one of the principal purposes of the statutory provisions at issue here."[3]?

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[3] Chan v. Bell, DCDC 1978, 464 F. Supp. 125

Table of Contents

QUESTIONS PRESENTED i
Table of Contents iv
Table of Authorities vi
OPINIONS BELOW 1
JURISDICTIONAL STATEMENT 2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 4
STATEMENT OF THE CASE 6
A. Background 6
B. Disposition in the district court 7
C. Disposition in the Eleventh Circuit 8
REASONS FOR GRANTING THE WRIT 12
1. The Eleventh Circuit failed to answer any of the Questions presented to the Court. 12
2. The Eleventh Circuit Improperly Terminated a Meritorious Appeal by Sua Sponte Dismissal 12
3. Dismissal causes deprivation of a protected liberty interest without a fair hearing 15
4. Summary Affirmance Denies Mayu Burr's entitlement to de novo consideration. 17
5. Summary Affirmance Impermissibly recognizes a party without standing. 18
6. The Eleventh Circuit Misapplied 11Cir.R.36-1. 18
7. Eleventh Circuit Orders Perpetuate and exacerbate fraud upon the Court. 22
8. Eleventh Circuit Orders cause infringement of right to pursue FRCP 60(b) action for fraud. 23
9. Affirmance without opinion is counterproductive of judicial economy. 23
10. Eleventh Circuit Order emboldens the Attorney General to invade sanctity of marriage 24
11. Summary Affirmance deprives Appellant of the significant precedential value of an opinion. 25
12. Summary Affirmance violates the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights 25

13. Eleventh Circuit Order dishonors the sanctity of marriage and imposes an unconstitutional Federal income test on marriage. 26
CONCLUSION 28
Appendix A (Summary Affirmance).....A-1
Appendix B (Denial of motions for reconsideration, clarification, relief, and oral argument).....B-1
Appendix C (Opinion and Order of District Court).....C-1
Appendix D (Order of District Court).....D-1

Table of Authorities

CASES

Alanis-Bustamante v. Reno, 201 F.3d 1303 (11th Cir. 2000).....29
Ali v. INS, 661 F.Supp. 1234 (D.Mass. 1986).....4, 8
Anastasoff v. United States of America.....22
Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).....4
Califano v. Sanders, 430 U.S. 99, 107 97 S.Ct. 980, 51 L.Ed.2d 192 (1977)).....2
Erie Railroad Company v Harry J. Tompkins, 304 U.S. 64-92.....26
Frazier v. Heebe, 107 S.Ct. 2607, 2610, 482 U.S. 641 (1987),.....23
Gonzalez Ex Rel. Gonzalez v. Janet Reno, 86 F.Supp.2d 1167 (S.D.Fla. 2000), affirmed 212 F.3d 1338 (11th Cir. 2000).....3, 18, 29
Gonzalez Ex Rel. Gonzalez v. Janet Reno, Attorney General, 86 F.Supp.2d at 1177 (S.D.Fla. 2000), affirmed 212 F.3d 1338 (11th Cir. 2000).....i
Kwon v. INS, 646 F.2d 909, 919 (5th Cir. May 1981.....29
Legal Environmental Assistance Foundation, Inc. v. EPA, 118 F.3d 1467, 1473 (11th Cir. 1997).....2
Loving v. Virginia, 388 U.S. 1, 12 (1967).....3
Meyer v. Nebraska, 262 U.S. 390, 400 (1923);.....3, 25
Michael Schmier v Eleventh Circuit, No. 01-14124,.....23
N.L.R.B. v. McClain of Georgia Inc., 11th Cir. Case #97-8444.....16
Pierce v. Society of Sisters, 268 U.S. 510, 531, 533, 534 (1928);.....3, 25
Powell v. Lennon, 914 F.2d 1459, 1463 (11th Cir. 1990).....4
Purolator Armored 764 F.2d 1427-28.....16
Whitehouse v. United States District Court, 53 F.3d 1349, 1355 (1st Cir. 1995).....23

STATUTES

28 USC § 1331 2
28 USC §1331 2
5 U.S.C. § 706(2)(A)). 2
5 U.S.C. §§ 701, 702 2
8 U.S.C. § 1182(a)(4)(C)(i)(II) 6, 28
8 U.S.C. § 1252 8
P.L. 101-649 28

OTHER AUTHORITIES

Article 2 of the International Covenant on Civil and Political Rights 26
Article 8 of the Universal Declaration of Human Rights 26
H.R. No. 101-723(I) 28
lex loci 26

RULES

11Cir.R.34-3 and its accompanying I.O.P. 1 17
11Cir.R.36-1 ..... passim
11thCir.R.27-2 20
Fed.R.Civ.P. 9(b) 23
FRAP 36 21
FRCP 60(b) 24
I.O.P.—5 ..... 14, 25
Supreme Court Rule 26 13

CONSTITUTIONAL PROVISIONS

Declaration of Independence 29
Due Process Clause of the Fifth Amendment 4
First Amendment of the U.S. Constitution 2
U.S. Constitution Amendment 10 27

PETITION FOR WRIT OF CERTIORARI

Petitioner Mayu Burr respectfully prays that a writ of certiorari issue to review the unpublished order and judgment of "summary affirmance" without opinion of the U.S. District Court's dismissal, by the United States Court of Appeals for the Eleventh District, entered in the above-titled case on August 29, 2002 and subsequent denial of motion for reconsideration by the United States Court of Appeals for the Eleventh District, entered in the above-titled case on October 21, 2002.

OPINIONS BELOW

The unpublished order of "summary affirmance" without opinion of the United States Court of Appeals for the Eleventh District is included in the appendix attached hereto at page A-1. The subsequent order denying petitioner's motions for reconsideration, clarification, relief, and oral argument is included in the appendix attached hereto at page B-1. For this Court's convenience, the district court's opinion and order dismissing the case is included in the appendix attached hereto at page C-1. The district court's concurrent order over-ruling Plaintiff's objection and motion to strike "Defendant's Opposition to Amended Complaint and Defendant's Motion to Dismiss" for reason of fraud upon the court is included in the appendix attached hereto at page D-1.

JURISDICTIONAL STATEMENT

On August 29, 2002 the United States Court of Appeals for the Eleventh Circuit entered its order of "summary affirmance" of the U.S. District Court's dismissal of the above-titled case.
The Eleventh Circuit denied a motion for reconsideration (equivalent to a motion for rehearing) on October 21, 2002.

The First Amendment of the U.S. Constitution guarantees to Mayu Burr the right to "... petition the Government for a redress of grievances."

Pursuant to United States Constitution, Article III, Section 2, and 28 USC §1331, U.S. Federal District Courts are the courts of original jurisdiction to hear any federal question, particularly when an officer of the United States Government is defendant. 28 USC § 1331, in conjunction with the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701, 702, (see Califano v. Sanders, 430 U.S. 99, 107 97 S.Ct. 980, 51 L.Ed.2d 192 (1977)) confer jurisdiction upon Federal Court to hear Mayu Burr's complaint that the decision of a federal officer was "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" Legal Environmental Assistance Foundation, Inc. v. EPA, 118 F.3d 1467, 1473 (11th Cir. 1997) (quoting 5 U.S.C. § 706(2)(A)).

Because Mayu Burr, a "person" within the meaning of the APA, 5 U.S.C. §§ 701, 702, alleges that "... an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority" (Id.), Petitioner Mayu Burr is entitled as a matter of law to judicial review under the APA, which states in pertinent part:

> "A person suffering legal wrong because of agency action, or adversely affected or

> aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." Id.

In particular, Immigration agency action - including discretionary action - is reviewable when it is alleged to be an abuse of discretion. The 11th Circuit held in Gonzalez v. Reno that

> "... if the ultimate decision of the INS - to treat Plaintiff's ... application as invalid - was 'arbitrary, capricious, [or] and abuse of discretion,' the decision is unlawful. ... 'the refusal to accept an ... application' is indeed reviewable under the APA."
> Gonzalez Ex Rel. Gonzalez v. Janet Reno, 86 F.Supp.2d 1167, 1177 (S.D.Fla. 2000), affirmed 212 F.3d 1338 (11th Cir. 2000)

Numerous Supreme Court decisions have held that Federal and State Government agencies may not invade nor restrict a couple's liberty interest in their marriage. Meyer v. Nebraska, 262 U.S. 390, 400 (1923); Pierce v. Society of Sisters, 268 U.S. 510, 531, 533, 534 (1928); Loving v. Virginia, 388 U.S. 1, 12 (1967)

The Attorney General has deprived both Appellant Mayu Burr and her husband of their Constitutionally protected

> "liberty interest in their marriage itself and the entitlements that accompany that status. Stokes, 393 F.Supp. at 29."
> ...
> "Americans married to aliens should not, Congress decided when it passed the INA, have their marriages burdened by the accidents of citizenship."
> Ali v. INS, 661 F.Supp. 1234 (D.Mass. 1986)

The Attorney General has violated the civil rights and human rights of Appellant Mayu Burr and her USC husband, including the sanctity of marriage, from which violation springs the entitlement to relief in the Federal Courts, which have subject matter jurisdiction over violations of civil rights by federal officers.[4]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment provides in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law." Petitioner Mayu Burr and her USC spouse have a Constitutionally protected liberty interest in their marriage, of which liberty interest Mayu Burr and her USC spouse have already been deprived by the Attorney General without any fair hearing at the district court or appellate level.

The first relevant statutory provision is found in the Immigration and Nationality Act ("INA") Section 204(a)(1)(A)(ii), 8 U.S.C. § 1154 (a)(1)(A)(ii), which provides in pertinent part:

> "An alien spouse described in the second sentence of section 1151(b)(2)(A)(i) of this title

[4] A federal officer has committed a Fifth Amendment "violation of the plaintiff's constitutional rights under color of law. See Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). . . . The Supreme Court has recognized that victims of constitutional violations committed by federal official have a cause of action against those officials. Bivens, 403 U.S. at 397, 91 S.Ct. at 2005." Powell v. Lennon, 914 F.2d 1459, 1463 (11th Cir. 1990)

> also may file a petition with the Attorney General under this subparagraph for classification of the alien (and the alien's children) under such section."[5]

It permits an alien spouse of a living USC to self-petition (i.e. petition on her own behalf without sponsorship by her USC spouse) for classification as an immediate relative of the USC spouse.

The second relevant statutory provision is found in the Immigration and Nationality Act ("INA") Section 204(b), 8 U.S.C. § 1154(b), which states in pertinent part:

> "After an investigation of the facts in each case ... the Attorney General **shall**, if he determines that the facts stated in the petition are true and that the alien in behalf of whom the petition is

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[5] Some publishers of law books have mistakenly printed section 1151(b)(2)(A)(i) with revised punctuation and typeface that makes the first sentence appear to be some sort of subsection title. Some printers have inserted dashes ("--") between the first and second sentences, or have even printed the first sentence on its own separate line. The second sentence then appears to be the "first sentence"; the third sentence appears to be the "second sentence", and so on. The real first sentence and "second sentence" of 8 USCS § 1151(b)(2)(A)(i) are reproduced here with accurate punctuation conforming to P.L. 101-649:

> Immediate relatives. For purposes of this subsection, the term "immediate relatives" means the children, spouses, and parents of a citizen of the United States, except that, in the case of parents, such citizens shall be at least 21 years of age.

Those persons wishing to delve more deeply into the historical context of the two sentences accurately reproduced above are referred to pages 49 - 62 of Mayu Burr's Amended Complaint and

> made is an immediate relative specified in section 1151(b) ... approve the petition and forward one copy thereof to the Department of State." [emphasis added]

It provides that the Attorney General has a non-discretionary duty to classify the alien spouse of a U.S. Citizen as an immediate relative.

The third relevant statutory provision, 8 U.S.C. § 1182(a)(4)(C)(i)(II), provides that an alien who has attained "classification pursuant to clause (ii) or (iii) of section 1154(a)(1)(B) of this title" is admissible without a citizen-sponsor.

STATEMENT OF THE CASE

A. Background

Plaintiff-Appellant Mayu Burr, a Japanese National, married U.S. Citizen Jack Burr II, with ceremonies concluding on April 27, 1998. Beginning in November 1998, Plaintiff-Appellant Mayu Burr submitted a "petition for classification as Immediate Relative of a U.S. Citizen", pursuant to Statute 8 USCS § 1154(a)(1)(A)(ii) -- **not** 8 U.S.C. § 1255(a), as urged by the Attorney General -- numerous times and in various ways, including personal appearance together with her USC husband at the INS Field Office in Tampa, Florida; by overnight courier directly to the Attorney General; and through the offices of her Congressman and Senators. (See Record, Exhibits Z, B, X, W, U, R, O, M, L.) In over two-and-a-half years, INS neither accepted nor denied her petition for

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the analysis of Senate and House Reports attached thereto as

classification as Immediate Relative, but instead issued a decision letter (see Record, Exhibit G) that it will not commence processing her self-petition prior to the death of her husband, whereupon she would become widow, as opposed to wife, of a U.S. citizen. Taking this decision letter as a final determination, and unsure of her rights under 8 USCS § 1154(a)(1)(A)(ii), Mayu Burr petitioned the district court for a declaratory judgment interpreting that statute, and for injunctive relief.

B. Disposition in the district court

The District Court denied the motion of Mayu Burr to appoint counsel. The Attorney General moved to dismiss alleging that Mrs. Burr was proceeding under 8 U.S.C. § 1255(a), upon which Mrs. Burr moved to strike the Attorney General's motion on grounds that she never relied upon or cited 8 U.S.C. § 1255(a) and that the Attorney General, in the text of his motion, had fraudulently redacted that impertinent Statute to make it appear to pertain to aliens who are Immediate Relatives. See Plaintiff's Motion to Strike, R. at Tab "Dkt.##38, 39" and compare unredacted text of 8 U.S.C. § 1255(a) reproduced at page 4 of Motion to Strike. In her Motion to Strike, Mayu Burr showed the district court

- that although she had never cited nor relied upon 8 U.S.C. § 1255(a), "The Attorney General continues to assume that Plaintiff is referring to INA Section 245" (See footnote at page 6, R. Tab "Dkt. 36".)
- that the statutory provisions of 8 U.S.C. § 1255(a) for discretionary "Adjustment of status" apply only to aliens not married to United States Citizens[6];

Exhibit 'J' (Record, Tab "Dkt.# 29").

[6] Typical examples are aliens who arrived with student visas and now want to change from student to foreign worker, or temporary foreign workers who now want to remain here permanently, or

- that all petitions to "grant Immigrant Status" involving the Immediate Relative spouse of a U.S. Citizen fall under subparagraphs (A)(i) and (A)(ii) of 8 U.S.C. § 1154(a)(1);
- that Congress specifically excluded those two subparagraphs from the list of subparagraphs enumerated in 8 U.S.C. § 1255(a), because the Attorney General has no discretion to deny a petition to "grant immigrant status" when the applicant is the Immediate Relative of a U.S. Citizen who does not batter his spouse. See 8 U.S.C. § 1154 (b). Chan v. Bell, DCDC 1978, 464 F. Supp. 125. Ali v. INS, 661 F.Supp. 1234 (D.Mass. 1986).

The District Court denied the Motion to Strike and dismissed the case, ruling that the case was brought under 8 U.S.C. § 1255(a), and that the court thus lacked subject matter jurisdiction based upon preclusion of review statute 8 U.S.C. § 1252, which covers all discretionary decisions made by the Attorney General under 8 U.S.C. § 1255(a), and mentioned as an ancillary reason that the Plaintiff had failed to exhaust available administrative remedies.

C. Disposition in the Eleventh Circuit

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husbands and wives of permanent resident aliens who wish to remain in this country. The only applicability of 8 U.S.C. § 1255(a) to the spouse of a U.S. Citizen is the narrow exception of an abused alien spouse who must, as condition of qualifying for "change of status" in the discretion of the Attorney General, supply evidence such as an order of protection barring the U.S. Citizen from approaching his spouse, evidence that the alien spouse sought safe haven in a battered women's shelter, and evidence such as a photograph of the visibly injured self-petitioner supported by affidavits -- all of which evidence demonstrates that the marriage is no longer viable.

Mayu Burr appealed to the Eleventh Circuit, posing the same twelve Questions as set forth in the present Petition. She showed the court

- that she is entitled by Statute to file a petition on her own behalf to be classified as Immediate Relative;
- that the Attorney General has a Statutory non-discretionary duty to consider and approve a true petition;
- that she cannot be required to first search for and exhaust other, indirect administrative remedies before requesting relief in the Federal court, once a Federal Officer has violated her rights, or after a Federal agency has issued its final determination;
- that the lower court's final order was based upon errors of law in that it relied upon a fraudulently redacted Statute, and that it failed to take judicial notice of a Statute that mandates the Attorney General's non-discretionary duty to approve the petition of the alien spouse of a U.S. Citizen.

The Attorney General, without filing any Appellee's Brief, filed "APPELLEE'S MOTION FOR AFFIRMANCE WITHOUT OPINION PURSUANT TO ELEVENTH CIRCUIT RULE 36-1 OR, IN THE ALTERNATIVE, MOTION FOR AN EXTENSION OF TIME TO FILE OPENING BRIEF". In his motion, he retreated from his prior position, which he had previously argued so vigorously, that the Court lacked subject matter jurisdiction pursuant to Section 242(a)(2)(B)(i) of the INA. At the same time, he abandoned the main point of his Motion to Dismiss -- indeed the very basis upon which the district court had granted his motion -- that Mayu Burr's complaint about failure to classify her as Immediate Relative "concerns a discretionary act of the Attorney General not subject to judicial review under the INA." (R. Tab "Dkt. 36", at page 3). The theory of non-reviewability of a discretionary act of the Attorney General was so crucial to the motion to

dismiss granted by the district court that the word "discretion[ary]" appeared no fewer than seventeen times in the fifteen page motion.

The Attorney General's Motion for Affirmance mysteriously breathed not a word about non-reviewability of a discretionary act. His abandonment of the main basis upon which the case was dismissed is acknowledged only by an indirect reference in a footnote at the bottom of page 6: "... the Government does not here urge dismissal under [Section 242(a)(2)(B)(i) of the INA]. ... the motion to affirm without opinion is based on the district court's failure to exhaust determination."

The Motion for Affirmance persisted in the self-serving but demonstrably incorrect assumption that Mayu Burr seeks "adjustment of status" rather than "classification as Immediate Relative".

The Attorney General, in his Motion for Affirmance, relied exclusively upon a "failure to exhaust" argument based upon the theme that "the self-petition provision of INA § 204(a)(1)(A)(ii) is not applicable to M[r]s. Burr because there is no evidence that her husband has passed away", and that there is only one way for Mrs. Burr to obtain classification as Immediate Relative: her USC husband must petition on her behalf. The Attorney General repeated this theme at least twelve times in eleven pages. In support of his assertion of Mrs. Burr's ineligibility he offered only circular logic: "As has been repeatedly explained to M[r]s. Burr, she does not qualify to petition on her own behalf under INA § 204(a)(1)(A)(ii) as she is not a widow." The Attorney General has previously characterized his own logic on this subject as "circular or solipsistic." See R. at Tab "Dkt.#36", p. 13.

In essence, the Attorney General constructed an elaborate syllogism based upon two false premises:

1. The alien spouse of a living U.S. Citizen can be classified as Immediate Relative and admitted as Permanent Resident only if she applies for Adjustment of Status under INA § 245.
2. The alien spouse of a living U.S. Citizen can be classified as Immediate Relative and admitted as Permanent Resident only if her U.S.C. husband petitions on her behalf under INA § 204(a)(1)(A)(i).

From these patently false premises, the syllogism concluded that because her husband had not petitioned on her behalf, Mayu Burr had failed to complete the steps required for an "adjustment of status" application; therefore she had not exhausted her administrative remedies as to an adjustment of status application. By this time, the court (and the reader) probably lost sight of the fact that Mayu Burr had not applied for adjustment of status; she petitioned for classification as Immediate Relative.

Mayu Burr objected to the motion and showed the court ample evidence that she had consistently sought classification as Immediate Relative; that "adjustment of status" under the Statute urged by the Attorney General applies only to aliens not married to U.S. citizens; and that the Attorney General had intentionally redacted the text of the Statute upon which he relied, in order to deceive the court that it applied to aliens married to U.S. citizens.

The Eleventh Circuit, in a panel conference without a hearing, affirmed without opinion the lower court dismissal, citing no reason, rule, or other authority in support of its order.

Mayu Burr promptly filed four motions concurrently:

- a motion for reconsideration (equivalent to a motion for re-hearing)
- a motion requesting oral argument
- a motion for clarification
- a motion for relief from a lower court judgment based upon fraud on the court

On October 21, 2002 the same panel denied all four motions.

REASONS FOR GRANTING THE WRIT

Fundamental fairness will be upheld only if this court provides guidance through a grant of a writ of certiorari here.

1. The Eleventh Circuit failed to answer any of the Questions presented to the Court.

Some of the Questions, particularly Questions 1, 2, 4, 7, and 8, gravely affect the Constitutional and Statutory entitlements of a large number of persons, both citizens and intending immigrants.

Each of the Questions presented in this petition has been fully addressed seriatim in the Appeal Brief of Mayu Burr before the Eleventh Circuit. Inasmuch as "the record is on file with the Clerk and available to the Justices", per Supreme Court Rule 26, it would be uneconomical to duplicate all of that argument in the present petition.

2. The Eleventh Circuit Improperly Terminated a Meritorious Appeal by Sua Sponte Dismissal.

The Eleventh Circuit Order (Appendix A, B) improperly terminated the appeal by sua sponte

dismissal of a meritorious complaint, which has never had a hearing, without citing any reasons or any authority (FRAP rule, Local Rule, or Case Law) under which the appeal may be dismissed. The Attorney General, having filed no Appellee's brief, had no standing to move the Eleventh Circuit Court for the equivalent of dismissal, and no part of FRAP or Local Rules authorizes a motion to dismiss[7] - the most drastic and final of all motions, but he so moved nevertheless, improperly citing 11Cir.R.36-1, a Local Rule which was established to aid the Court at the conclusion of a hearing. As more fully set forth in Reason Number 5, below, the Rule may not be invoked prior to a hearing in open court on the merits.

In the absence of an Appellee's brief and without a hearing in open court, the Court couldn't grant the relief requested, so it changed the motion sua sponte to something that the Court thought it could grant. Knowing that it could not apply 11Cir.R.36-1, it re-construed the motion, removing all reference to that rule from the re-construed motion and from its order. In the process, the Court disposed of the case in a way that is not covered under any local rule or any part of FRAP. There are no provisions in FRAP or in Local Rules for so-called "Summary Affirmance"; nor are there any provisions for summary judgment in appellate review; nor are there any provisions for summary dismissal, which is what the court did. In dismissing the appeal without a hearing and without any authority in the Court Rules, the Court apparently exercised its imagination as provided in 11th Cir. R. 36, I.O.P.—5. Publication of Opinions:

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[7] On September 6, 2002 Brenda O'Connell, Assistant to Thomas K. Kahn, Clerk told Petitioner: "People can file any kind of motion. We don't have room in the rule book to cover every type of motion that may be filed. That's why a motion to dismiss is not mentioned in the rules."

> ... The policy of the court is: The unlimited proliferation of published opinions is undesirable because it tends to impair the development of the cohesive body of law. To meet this serious problem, it is declared to be the basic policy of this court to exercise imaginative and innovative resourcefulness in fashioning new methods to increase judicial efficiency and reduce the volume of published opinions."
> 11th Cir. R. 36, I.O.P.—5. Publication of Opinions

This Court has "exercise[d] imaginative and innovative resourcefulness" by dismissing the appeal sua sponte, without citing any rule or other authority, thereby depriving Mayu Burr of a hearing and of her due process rights "to increase judicial efficiency". If this is not an abuse of discretion, what is?

To understand the extremely extraordinary nature of the Eleventh Circuit's sua sponte termination of this appeal[8], refer to Table B-5A for statistics of appeals terminated by procedural judgments, by circuit, (Record, Exhibit 'A' attached to APPELLANT'S MOTION FOR RECONSIDERATION OF AN ORDER OR JUDGMENT PURSUANT TO 11thCir.R.27-2). In 1999, the most recent year for which statistics are publicly available, out of 4,179 civil appeals terminated in all circuits, only 6 appeals (0.1% of all cases) were terminated by Eleventh Circuit judges for reason other than jurisdictional defects or FRAP 42 voluntary dismissal. Clearly the sua sponte termination of this appeal without a hearing is highly irregular.

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[8] On September 6, 2002 Robert Phelps, Assistant to Thomas K. Kahn, Clerk told Appellant: "We dismissed the case before it was put on either the oral argument or the non-argument calendar. We don't do this very often."

Mayu Burr relied upon numerous assurances in FRAP, local rules, and I.O.P. that each and every case will receive a hearing, and that

> "The assignment of an appeal to the non-argument calendar does not mean that it is considered to be an appeal of less importance than an orally argued appeal."
> 11th Cir. R. 34 I.O.P. 1

There are no provisions in any of the FRAP or local rules for dismissing a case except on motion of Appellant, or by the Court for failure to file an Appellant's brief. A "Summary Affirmance" is a thinly disguised dismissal. There are no provisions for "Summary Affirmance", or for any kind of summary dismissal at the Appellate level.

In N.L.R.B. v. McClain of Georgia Inc., 11th Cir. Case #97-8444 the Eleventh Circuit cited Purolator Armored 764 F.2d 1427-28 and held a "party entitled to summary affirmance, where other party did not raise arguments on appeal as to certain findings." However, Mayu Burr raised the necessary arguments on appeal, so summary affirmance is not available under these circumstances.

3. Dismissal causes deprivation of a protected liberty interest without a fair hearing.
Mayu Burr's case was terminated without a hearing at any level.

Terminating the appeal without first granting a fair hearing on the merits will embolden the Attorney General to further deprive Mayu Burr and her U.S.C. spouse of their Constitutionally protected liberty interest in their marriage by breaking up their

marriage -- if not immediately, then certainly the next time they attempt an international trip. As set forth numerous times in prior pleadings, with ample citations of case law and the U.S. Constitution, the Court may not deprive Mayu Burr of the Constitutionally protected liberty interest in her marriage without first granting her a fair hearing on the merits of her case. She has thus far had no hearing in the lower court and no hearing before the Court of Appeals.

The Court has bamboozled the neophyte Appellant by using her willingness for the case to be heard without oral argument on issues of fact as a means of getting rid of her case. Appellant Mayu Burr never intended to waive her right to a hearing on points of law. The Eleventh Circuit Court follows unwritten policies as articulated orally on September 6, 2002 by Brenda O'Connell and Robert Phelps, Assistants to Thomas K. Kahn, Clerk, that the Eleventh Circuit Court defines "panel conference" as a session at which "oral argument" is not heard; that it defines the word "hearing" as a session at which "oral argument" is heard; that a R.28-1(c) Statement Regarding Oral Argument which does not request oral argument will be construed by the Court as a waiver of hearing on the merits; that the Court "panel conference" may then dispose of the case by dismissal without placing the matter on the non-oral calendar[9], although this imaginative and irregular procedure is not described anywhere in FRAP, and explicitly contrary to 11Cir.R.34-3 and its accompanying I.O.P. 1.

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[9] On September 6, 2002 Robert Phelps, Assistant to Thomas K. Kahn, Clerk said: "We don't hear every case that comes before us."

The Eleventh Circuit tribunal that tossed out Mayu Burr's appeal without a fair hearing, indeed admittedly without any hearing whatever, was Constitutionally deficient.

4. Summary Affirmance Denies Mayu Burr's entitlement to de novo consideration.

The original Brief before the Court of Appeals indicated that it is either a "BRIEF ON APPEAL FROM A JUDGMENT OR ORDER OF A DISTRICT COURT; OR IN THE ALTERNATIVE, REVIEW OF AN ORDER OF AN ADMINISTRATIVE AGENCY OR OFFICER". Affirming a dismissal by the lower court on jurisdictional grounds could not fully dispose of the action before the Eleventh Circuit. The Court of Appeals is the court of original jurisdiction to hear an appeal of a final agency determination. The lower court did not have jurisdiction to issue a final judgment as to agency policy, so Eleventh Circuit could not terminate the case by affirming the lower court judgment. Mayu Burr has cited a landmark case in which the Eleventh Circuit held that a policy letter from the Commissioner of INS constitutes a final agency order that "would trigger review by the Eleventh Circuit."[10] Failing to grant de novo

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[10] "In our case, the INS did directly decide Plaintiff's specific right to file certain . . . applications under the pertinent statute and did so after receiving and weighing some evidence. The INS decision was final and binding on Plaintiff unless he, in effect, appealed it to a court. The sovereign power of the United States -- per the INS and the Attorney General -- had determined that neither Plaintiff . . . could file . . .. This kind of administrative decisionmaking -- which we think no one can seriously question was the deliberate and official position of the pertinent agencies of the executive branch of our government -- is substantially different from and more than the opinion letter in Christensen. We considered the administrative decisionmaking in this case to be adjudication." Gonzalez Ex Rel. Gonzalez v. Janet Reno, 86 F.Supp.2d 1167 (S.D.Fla. 2000), affirmed 212 F.3d 1338 (11th Cir. 2000) Per

consideration of Mayu Burr's Brief would be inconsistent with Eleventh Circuit precedent.

5. Summary Affirmance Impermissibly recognizes a party without standing.

In granting the motion of the Attorney General, who has never filed an Answer or Appellee's Brief, who has filed five motions for extension of time to answer, and who has flouted the Rules of the lower court and of the Eleventh Circuit, the Eleventh Circuit extended extraordinary deference to that party. While the Court owes great deference to the Attorney General's construction of a Statute, there is no Constitutionally supportable theory under which the Eleventh Circuit may greatly expand that deference by failing to hold the Attorney General accountable for his frequent, flagrant disregard of FRAP and Federal Rules of Civil Procedure, even after the Court was placed on notice by Plaintiff-appellant.[11] Granting the motion of a party without standing just because he happens to be the Attorney General would perpetuate the pattern of undue deference which militates against the Court's duty to afford "Equal Protection of the laws to all persons, not only to high officers of the executive branch of government."[12]

6. The Eleventh Circuit Misapplied 11Cir.R.36-1.

11Cir.R.36-1 provides:

Curiam Opinion upon petition for rehearing en banc, June 23, 2000.

[11] See Objection No. 2 in Appellant's Brief on Appeal pp. 1,9,10. See also "APPELLANT'S MOTION TO STRIKE APPELLEE'S MOTION FOR AFFIRMANCE WITHOUT OPINION; OPPOSITION TO MOTION FOR EXTENSION OF TIME TO FILE OPENING BRIEF" generally.

[12] See Appellant's Brief on Appeal, pp. 9,10.

> 11th Cir. R. 36-1. AFFIRMANCE WITHOUT OPINION
> When the court determines that any of the following circumstances exist:
> (a) the judgment of the district court is based on findings of fact that are not clearly erroneous;
> (b) the evidence in support of a jury verdict is sufficient;
> (c) the order of an administrative agency is supported by substantial evidence on the record as a whole;
> (d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;
> (e) the judgment has been entered without a reversible error of law;
>
> and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

If the Eleventh Circuit relied upon Local Rule 36-1, it failed to clarify on which basis (a) through (e) it took action. See "MOTION FOR CLARIFICATION OF ORDER" filed concurrently with Mayu Burr's "MOTION FOR RECONSIDERATION OF AN ORDER OR JUDGMENT PURSUANT TO 11thCir.R.27-2". There has been no "judgment" in the lower court, in that there was no judgment on the merits, as described in this rule. The lower court's final order is based upon an error of law in that it relied upon a fraudulently redacted Statute, and that it failed to take judicial notice of a Statute that mandates the Attorney General's non-discretionary duty to approve the petition of the alien spouse of a U.S. Citizen.

The violations of the United States Constitution which result from applying Local Rule 36-1 before a fair

hearing on the merits, and which further results from applying Rule 36-1 to a case which has great precedential value in that it determines the rights of the alien spouse of a living U.S. Citizen to file a self-petition for classification as Immediate Relative cause grievous harm to Mayu Burr, and the harm caused is not compensable in damages as it deprives her of the fundamental right to be heard.

Misapplication of these rules violates Mayu Burr's rights to equal protection and due process guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution in that 11Cir.R.36-1 is available to be invoked by the Court only under strictly delineated circumstances, at the conclusion of a hearing. 11Cir.R.36-1 is not intended to be invoked by a party. Under no circumstance may 11Cir.R.36-1 be invoked by a party who has no standing because he has failed to file the required Brief.

When the Eleventh Circuit permits the Attorney General, by reason of his **ELEVATED TITLE**, to escape his duty to file an Answer, his duty to file an Appellee's Brief, and his duty under 8 USCS § 1154(a)(1)(A)(ii) and § 1154(b) to consider and approve Mrs. Burr's petition, and then to cover its tracks by application of 11Cir.R.36-1, the fangs of 11Cir.R.36-1 are bared against Equal Protection of the Laws[13].

FRAP 36 and Local Rules subordinate to FRAP 36 were established to aid the Court at the conclusion of a hearing in open court -- not in place of a hearing. Other circuits agree that local rules under FRAP 36 as is 11Cir.R.36-1 may only be applied after a hearing in open court. See for example 6 Cir.R.36:

> **Entry of Judgment - Dispositions in Open Court**

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[13] "All [men] are created equal, but some are more equal than others." Animal Farm by George Orwell

> "In those cases in which the decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by a written opinion, disposition of the case may be made in open court following oral argument. A written judgment shall be signed and entered by the clerk in accordance with the decision of the panel from the bench. Counsel may obtain from the clerk a copy of the transcript of the decision as it was announced from the bench."
> 6 Cir.R.36 (emphasis supplied)

If the Eleventh Circuit used 11Cir.R.36-1 to terminate this appeal without opinion prior to a fair hearing on the merits in open court, then 11Cir.R.36-1 violates Mrs. Burr's right to petition the government for redress of grievances guaranteed by the First Amendment to the United States Constitution, in that it impermissibly creates restraints on Mayu Burr's ability to exercise her constitutional rights to petition the government for redress of grievances by foreclosing her right to a fair hearing before being deprived of a protected liberty interest. This also trammels her free speech rights before the very tribunals that are constitutionally charged with protecting free speech. Every judicial decision and act in the Eleventh Circuit is an interpretation and declaration of a general principle or rule of law which is authoritative to the extent necessary for each particular decision and which should be applied in subsequent decisions to similarly situated parties[14]. To the extent Circuit Rule 36-1 allows the Court of Appeals to avoid going on record with its opinion, the authority upon which it renders judgment, and the reasons underlying that judgment, the law is applied

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[14] Anastasoff v. United States of America, 223 F.3d 898 (8th Cir. 2000)

inequitably and unequally, and the judicial power is expanded beyond the constitutional bounds of Article III of the United States Constitution. By applying Rule 36-1 to any action that challenges the application of Rule 36-1, the Court covers its tracks and makes meaningful research of precedential decisions by litigants such as Mayu Burr exceedingly difficult and onerous[15]. Regardless of the level of judicial expediency intended or obtained by the Rule, it cannot be justified within the bounds of the United States Constitution; judicial expediency may be obtained through less intrusive means. Local rules which are constitutionally infirm, among other reasons recognized in law, are invalid. See Frazier v. Heebe, 107 S.Ct. 2607, 2610, 482 U.S. 641 (1987), Whitehouse v. United States District Court, 53 F.3d 1349, 1355 (1st Cir. 1995).

7. Eleventh Circuit Orders Perpetuate and exacerbate fraud upon the Court.

The Attorney General committed a fraud upon the court by basing his motion to dismiss upon an impertinent statute, surreptitiously redacted to his benefit and to the detriment of Mayu Burr. The district court failed to take judicial notice of the fraudulent redaction, and of its purpose to deceive the court that 8 U.S.C. § 1255(a) pertains to all aliens, rather than only to intending immigrants not married to U.S. citizens, as intended by Congress.

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[15] The existence of case Michael Schmier v Eleventh Circuit, No. 01-14124, cover page marked "DO NOT PUBLISH" attached as Exhibit 'B' to MOTION FOR RECONSIDERATION, a recent Eleventh Circuit decision on the validity of 11th Circuit Local Rule 36-1, could not be discovered by normal means or by Shepardizing. Although the case was considered on the non-argument calendar, and an opinion was written, it was not published and had to be ferreted out by extraordinarily indirect methods.

Pursuant to Fed.R.Civ.P. 9(b), Mayu Burr has described with particularity the circumstances of fraud upon the lower court and again upon the Eleventh Circuit. In view of the Attorney General's non-discretionary duty under 8 USCS § 1154(b) to approve the petition of the alien spouse of a U.S. Citizen for classification as Immediate Relative, the Court must not disregard the cunning and disingenuousness by which the Attorney General altered 8 U.S.C. § 1255(a) to deceive the Court that he has unreviewable discretion over the petition of an Immediate Relative.

8. Eleventh Circuit Orders cause infringement of right to pursue FRCP 60(b) action for fraud.

Although the Eleventh Circuit did not address the issue of fraud or render any opinion whatever, its Mandate to the lower court issued in conjunction with its Order and Judgment are likely to be construed by the lower court as dispositive of the issue of fraud, barring Mayu Burr from pursuing an independent action permitted under FRCP 60(b) to "set aside a judgment for fraud upon the court."

9. Affirmance without opinion is counterproductive of judicial economy.

Mayu Burr naively filed her petition in Federal District Court in order to ask a judge to answer a simple question and to decide her rights -- whether she is entitled to self-petition -- by interpreting 8 USCS § 1154(a)(1)(A)(ii). The Court and the Attorney General used every trick in the book to sidestep that simple question, in the process necessitating reams of pleadings. The proliferation of pleadings could have been avoided, and can still be avoided, if this Court will simply rule clearly that 8 USCS § 1154(a)(1)(A)(ii) applies only to widows/widowers, or that the Statute indeed confers an entitlement on the wives and

husbands of living U.S. Citizens. Because the Eleventh Circuit persisted in ordering "Summary Affirmance" without fair hearing on the merits and without opinion, Mayu Burr has no choice but escalate her appeal by submitting the present Petition for Writ of Certiorari -- hardly the judicial economy contemplated by 11Cir.R.36-1 and its I.O.P.—5.

10. Eleventh Circuit Order emboldens the Attorney General to invade sanctity of marriage.

Numerous Supreme Court decisions have held that Federal and State Government agencies may not invade nor restrict a couple's liberty interest in their marriage. Meyer v. Nebraska, 262 U.S. 390, 400 (1923); Pierce v. Society of Sisters, 268 U.S. 510, 531, 533, 534 (1928); Loving v. Virginia, 388 U.S. 1, 12 (1967). Mayu Burr has shown in her Appeal Brief, with citations of Statutory law and high court decisions, that the Attorney General may not invade the sanctity of marriage.

In the present case the Attorney General seeks to arrogate discretionary power not granted to him by Congress to approve or deny the petition and application of the alien spouse of a U.S. Citizen in the same way that he treats applicants who are not Immediate Relatives. He seeks to erode the special status that Congress conferred upon Immediate Relative spouses under the INA. The Attorney General has conceded that Congress never intended to apply sponsorship and support requirements to the petition of the alien spouse of a U.S. Citizen described in 8 USCS § 1154(a)(1)(A)(ii); that spouse is not required under 8 CFR to have a sponsor. The only point of contention is whether the alien spouse of a living U.S. Citizen is entitled under that Statute. Congress knows that under State law, the wife already has a "sponsor" -- the husband -- who is subject to criminal penalties enacted under State law if he does

not support his wife. In liability matters including marriage, Federal law is required to yield to lex loci. Erie Railroad Company v Harry J. Tompkins, 304 U.S. 64-92. The Florida State laws requiring a husband to financially support his wife supersede any support or sponsorship requirement that the Attorney General can invent.

11. Summary Affirmance deprives Appellant of the significant precedential value of an opinion.

A published opinion as to whether 8 USCS § 1154(a)(1)(A)(ii) entitles the alien spouse of a living U.S. Citizen to file a self-petition for classification as Immediate Relative, and as to whether the Attorney General has the non-discretionary duty to approve the petition of the spouse of a U.S. Citizen under 8 USCS § 1154(b), has significant precedential value to Mrs. Burr and to other interested persons. Thousands of applicants and government staff workers will likely be affected by such a precedential opinion. Under these circumstances, a "Summary Affirmance" without published opinion is prohibited by 11thCir.R.36-1.

12. Summary Affirmance violates the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

Article 8 of the Universal Declaration of Human Rights specifically mandates that:

> "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."

Article 2 of the International Covenant on Civil and Political Rights requires State parties:

> "(3)(a) To ensure that any person whose rights or freedoms as herein recognized shall have an effective remedy notwithstanding that the violation has been committed by persons acting in an official capacity."

Because this treaty of the United States was ratified by the Senate on April 2, 1992, and confirmed by President Bush on June 1, 1992, the Court may not terminate the case of Mayu Burr without a hearing in open court and without an opinion, in contravention of the terms of the treaty.

13. Eleventh Circuit Order dishonors the sanctity of marriage and imposes an unconstitutional Federal income test on marriage.

The Eleventh Circuit has affirmed a lower court Order that Mayu Burr must go and persuade a U.S. citizen who meets an income test to sponsor her before she can be classified as Immediate Relative and receive the subsequent "grant of Immigrant Status"; that until she has done this she may not complain in court about not receiving the "grant of Immigrant Status".

To the extent that marriage may be regulated at all by government, it is regulated by applicable State law, not Federal law. Laws of the various States already require a man to support his wife. The Federal government may not duplicate or pre-empt State law on the subject of marriage[16]. The Federal government may not erect onerous financial obstacles to a U.S. citizen and foreign spouse who enter into matrimony in good faith. In particular, the Federal government has no power to impose sponsorship and an income test as a condition of allowing marriage to an

American bread-winner. That is why Congress exempted Immediate Relative spouses from the sponsorship requirements that other immigrants must meet. 8 U.S.C. § 1182(a)(4)(C)(i)(II). That is why Congress specifically exempted Immediate Relative spouses (so classified under subparagraph (A)(i), (A)(ii), of 8 U.S.C. § 1154(a)(1)) from having their Immigrant Status granted by the Attorney General "in his discretion". 8 U.S.C. § 1255(a). That is why Congress made the grant of Immigrant Status mandatory. 8 U.S.C. § 1154(b). That is why the Act of Congress that granted Statutory entitlements to alien spouses of U.S. citizens is entitled the "Family Reunification Act" P.L. 101-649. (See H.R. No. 101-723(I), attached as Exhibit 'D' to Amended Complaint, Record Tab "Dkt. #29")

Marriage is a sacred institution already allowed by a higher Power. The Federal government is bound by the Declaration of Independence, the Constitution, and Statutes to honor and support the institution of marriage.

Mayu Burr contends that the Eleventh Circuit has trammeled her Constitutional rights and Statutory entitlements. She prays that this Court remedy the situation by granting certiorari here. In a precedential effort to fathom the murky waters of the INA, the Eleventh Circuit has already thrown up its hands on the record[17]. In the present case the Attorney General

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[16] U.S. Constitution Amendment 10

[17] "As observed in a recent decision of the Eleventh Circuit, "this is immigration law where the issues are seldom simple and the answers are far from clear." Alanis-Bustamante v. Reno, 201 F.3d 1303 (11th Cir. 2000). Notably, this view of immigration law is hardly a recent phenomenon. See Kwon v. INS, 646 F.2d 909, 919

has used his obfuscatory jargon to inveigle the court that a Statutorily entitled petition for classification as Immediate Relative is the same as an application for discretionary relief in the form of "adjustment of status". It is not.

Mayu Burr prays this Court exercise its considerable supervisory power here, to guide the Eleventh Circuit in honoring the special status that Congress has conferred on the Immediate Relative of a U.S. citizen, and to remind both the Eleventh Circuit and the Attorney General that under the Law of this Land married couples are most particularly

> "endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness". Declaration of Independence

CONCLUSION

For any one or combination of the reasons stated above, Petitioner Mayu Burr respectfully prays that a writ of certiorari issue to review the unpublished orders dated August 29 and October 21, 2002 of the

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(5th Cir. May 1981)[17] ("Whatever guidance the regulations furnish to those cognoscenti familiar with INS procedures, this court, despite many years of legal experience, finds that they yield up meaning only grudgingly and that morsels of comprehension must be pried from mollusks of jargon.")"
Gonzalez Ex Rel. Gonzalez v. Janet Reno, 86 F.Supp.2d 1167 (S.D.Fla. 2000), affirmed 212 F.3d 1338 (11th Cir. 2000)

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Respectfully submitted,

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